STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COALITION OF UNIVERSITY EMPLOYEES, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (LAWRENCE BERKELEY NATIONAL LABORATORY), Respondent.	Case No. SF-CE-945-H Administrative Appeal PERB Order No. Ad-397-H February 22, 2013

Appearance: Regina Mann-McFarlane, on her own behalf.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Regina Mann-McFarlane (Mann-McFarlane) from the administrative determination by the PERB Appeals Assistant denying her request for an extension of time by which to file a statement of exceptions to the proposed decision of a PERB administrative law judge (ALJ). The PERB Appeals Assistant denied the request because Mann-McFarlane is not a party to this case. For the reasons set forth below, we affirm the denial of Mann-McFarlane's request for extension of time.

PROCEDURAL HISTORY

The Coalition of University Employees (CUE) filed an unfair practice charge against the Regents of the University of California (Lawrence Berkeley National Laboratory) (University) on May 25, 2010, alleging multiple acts of retaliation against two employees and an unlawful unilateral change to the disciplinary policy. Mann-McFarlane was one of the two employees allegedly subject to the acts of retaliation. CUE filed amended charges on

December 29, 2010 and March 21, 2011. On April 11, 2011, PERB's Office of the General Counsel issued a complaint that alleged the University retaliated against Mann-McFarlane in violation of the Higher Education Employer-Employee Relations Act (HEERA)[1] by issuing her a final disciplinary warning because Mann-McFarlane filed a grievance in October 2009 and complained that her supervisor changed her timecard. The remaining allegations were dismissed.

CUE and the University participated in a settlement conference on May 12, 2011, but the matter was not resolved. On September 7, 2011, CUE filed a motion to amend the complaint to add five new allegations of unlawful conduct. The motion was denied. A formal hearing was held on September 14 and October 26, 2011. The record was closed on December 20, 2011, following the submission of additional exhibits identified during the hearing.

CUE and the University engaged in further settlement discussions but were unable to resolve the matter. The case was submitted for decision after post-hearing briefs were filed. On October 31, 2012, the ALJ issued a twenty-one page proposed decision and order dismissing the case. As stated, the proposed decision and order would become final under PERB Regulation 32305[2] unless a party filed a statement of exceptions within 20 days of service. Also as stated, any statement of exceptions and supporting brief were required to be served concurrently with its filing upon each party to the proceeding, with proof of service to accompany each copy served or filed. The cover letter to the proposed decision and order

[1] HEERA is codified at Government Code section 3560 et seq.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

stated that a request for extension of time is subject to the same service and proof of service requirements.

Neither party, CUE nor the University, filed a statement of exceptions. By letter dated November 14, 2012, however, Mann-McFarlane requested an extension of time by which to file a statement of exceptions. Mann-McFarlane explained that she did not agree with credibility determinations made by the ALJ against her and in favor of a witness for the University. Mann-McFarlane also stated that counsel for the University did not object to her request for extension. Last, Mann-McFarlane requested that her name be added as a charging party "since my Union will not be appealing for me." Neither CUE nor the University were served with a copy of Mann-McFarlane's letter.

By letter dated November 15, 2012, the Appeals Assistant responded to Mann-McFarlane's request for extension. The letter cited to PERB Regulation 32300, which provides that a statement of exceptions to a proposed decision may be filed by a party. Because Mann-McFarlane was not a party, her request was denied. The Appeals Assistant enclosed a copy of Mann-McFarlane's letter of November 14, 2012, for the benefit of the parties.

By letter dated November 24, 2012, Mann-McFarlane appealed the denial of her request for an extension of time. Mann-McFarlane served the University, but not CUE, with a copy of her appeal.[3]

[3] On January 27, 2013, Mann-McFarlane faxed a document to the Appeals Assistant containing four specific complaints about testimony and other evidence presented at the formal hearing. PERB Regulation 32360, subdivision (b), requires that an administrative appeal be filed within 10 days following the date of service of the decision or letter of determination. To the extent Mann-McFarlane intended the January 27 document to be included as part of her appeal, it is not timely. Nor does it comply with service and proof of service requirements for an appeal under PERB Regulation 32360, subdivision (d). Even were we to consider this document in our review of Mann-McFarlane's appeal, it would effect no change in the analysis of the issues or the outcome of the appeal for the reasons explained herein.

DISCUSSION

The main issue in this case is whether Mann-McFarlane, a non-party, has standing to pursue an appeal of the proposed decision. If she lacks standing, the Appeals Assistant was correct to deny Mann-McFarlane's request for extension.

PERB Regulation 32300, subdivision (a) provides:

> A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision . . . .

PERB Regulation 32305 provides:

> Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final on the date specified therein.

The regulations are clear and unambiguous. Only "a party" to a proposed decision has the right to except from it. There are two parties to the proposed decision, CUE and the University. Neither party filed a statement of exceptions. Because Mann-McFarlane was not a party to the case and therefore lacked standing to file a statement of exceptions, the Appeals Assistant was correct to deny her request for an extension of time. By operation of PERB Regulation 32305, the proposed decision became final on November 27, 2012.

The regulatory scheme delineates distinctions between the rights of parties and the rights of non-parties. PERB Regulation 32180, for example, sets forth the rights of parties to a formal hearing as including the right to appear in person, by counsel or by other representative; the right to call, examine and cross-examine witnesses; and the right to introduce documentary and other evidence on the issues. By contrast, PERB Regulation 32210 allows "any person" to file a petition to submit an informational brief or to argue orally in any case at a hearing or

before the Board itself. Notably, like PERB Regulation 32180, the regulation governing the filing of exceptions grants appeal rights to the more limited category of entities and individuals referred to as "parties."

The outcome here is consistent with the Board's decision in *John Swett Unified School District* (1981) PERB Decision No. 188. The charge was brought by the employee organization. It alleged that the school principal threatened and coerced a teacher, John O'Dwyer, because of his exercise of protected rights. The proposed decision found in favor of the employee organization on that allegation, but dismissed other allegations. The case came before the Board itself on exceptions filed by the school district. The teacher, through his own representative, also filed exceptions, but the Board itself declined to consider them. The Board held:

> Finally, the Board declines to review a submission labeled "exceptions" to the hearing officer's decision from the attorney representative of O'Dwyer. PERB rule 32300 only permits a "party" to submit exceptions to a proposed hearing officer's decision. Because the Association, and not O'Dwyer, is the charging party, we will not consider the substance of the objections filed on O'Dwyer's behalf.

(Fn. omitted.)

Similarly here, CUE, and not Mann-McFarlane, is the charging party. Neither the charge nor the complaint was amended to add Mann-McFarlane as a party.[4] Mann-McFarlane

[4] See PERB Regulation 32621 (amendment of charge before issuance of complaint); PERB Regulation 32647 (amendment of complaint before hearing); and PERB Regulation 32648 (amendment of complaint during hearing).

did not file a request for joinder with the ALJ.[5] While Mann-McFarlane has an individual interest in the outcome of this case, the charge was brought by CUE to vindicate a collective interest as determined by CUE. To accord Mann-McFarlane the right to appellate review of the proposed decision is not only to contravene the regulatory scheme but also to undercut CUE's right to control the administrative litigation of its own case.

While PERB Regulation 32164 provides for a joinder application procedure, it is of no avail here for the following reasons. First, no formal application for joinder meeting the requirements of subdivision (b) was ever filed.[6] Second, under both subdivisions (c) and (d), joinder is allowed only at the discretion of the Board, and there is nothing about the circumstances presented here that would warrant the Board's exercise of discretion. Moreover, under subdivision (c), joinder is not permitted where it would unduly impede the proceeding. The proposed decision of the ALJ became final on November 27, 2012. Joinder of Mann-McFarlane would revive a proceeding that has already concluded, a result as problematic as impeding an ongoing proceeding. More importantly, to allow joinder at this stage of the proceedings would subvert the clear and unambiguous meaning of PERB Regulation 32300 limiting the right to file exceptions from a proposed decision to the parties to the case. Joinder

[5] PERB Regulation 32164, subdivision a, provides: "Any employee, employee organization or employer may file with the Board agent an application for joinder as a party in a case."

[6] PERB Regulation, subdivision (b) provides in pertinent part:

> The application for joinder shall be in writing, signed by the representative filing it and contain a statement of the extent to which joinder is sought and a statement of all the facts upon which the application is based.

under these circumstances is not contemplated by the regulatory scheme. Accordingly, we deny the appeal.[7]

ORDER

Regina Mann-McFarlane's administrative appeal of the PERB Appeals Assistant's denial of her request for an extension of time by which to file exceptions to the administrative law judge's (ALJ) proposed decision in Case No. SF-CE-945-H is hereby DENIED. The ALJ's proposed decision is final.

Members Huguenin and Winslow joined in this Decision.

[7] According to the proof of service, Mann-McFarlane did not serve her appeal on CUE as required by PERB Regulation 32360, subdivision (d). "These [service] requirements are not merely ritualistic. They are basic to providing due process to the involved parties." (*Los Angeles Community College District* (1984) PERB Decision No. 395.)

CUE officially learned of the administrative appeal by letter from the Appeals Assistant dated December 6, 2012. This letter informed the parties that the filings pertaining to the appeal were complete and the case had been placed on the Board's docket. Although the Board has the authority to excuse defective service if the opposing party received actual notice of the filing and there is no showing of prejudice (*Coronado Unified School District* (1989) PERB Order No. Ad-188), this case involves a failure to serve, not defective service. Although the interests of Mann-McFarlane and CUE were once aligned at an earlier stage of the proceedings, CUE chose not to file exceptions. Its interests can no longer be considered aligned with those of Mann-McFarlane. Under these circumstances, prejudice to CUE arising out of Mann-McFarlane's failure to serve CUE is clear. Therefore, Mann-McFarlane's appeal is also denied for failure to comply with PERB's service requirements.